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Recommended Citation

Philip Kunz, *Whose Tube? A Contributory Copyright Infringement Analysis of the Pending Lawsuit, Robert Tur v. Youtube Inc.*, 17 DePaul J. Art, Tech. & Intell. Prop. L. 167 (2006)
Available at: <https://via.library.depaul.edu/jatip/vol17/iss1/6>

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WHOSE TUBE? – A CONTRIBUTORY COPYRIGHT INFRINGEMENT ANALYSIS OF THE PENDING LAWSUIT, *ROBERT TUR V. YOUTUBE INC.*

I. INTRODUCTION

In February of 2005, Steve Chen, an engineer in California, hosted a dinner party during which he and gathered friends took many digital pictures and video clips.¹ Upon uploading all of their pictures to the Web with ease, Chen and two other friends found it quite difficult to share large video files quite as easily.² By May of that year, these three computer engineers had come up with a solution to the problem of online video sharing and launched a website that would allow computer users to view videos from their Web browsers without needing special software.³ They called their website youtube.com. Between word-of-mouth publicity and venture capital funding, the website grew in one year to be among the top-ten most popular sites on the Internet, with content ranging from five-second home video clips to ten-minute segments of popular television shows.⁴ However, due to the increasing popularity of the site, and YouTube users' propensity to upload copyrighted material without the consent of the owner, YouTube has become the target of a contributory copyright infringement lawsuit.⁵

This note examines the issues involved in the currently pending lawsuit filed on July 14, 2006 by copyright owner Robert Tur

1. David Greising, *YouTube Founder Rides Video Clips to Dot-com Riches*, CHI. TRIB., Oct. 15, 2006, at C1.

2. *Id.*

3. *Id.*

4. *Id.*

5. Compl. at 10, *Tur v. YouTube, Inc.*, No. 06-cv-00436 (C.D. Cal. July 14, 2006).

against the web-company YouTube. Particularly, this note will predict whether or not YouTube will be held liable for contributory copyright infringement for hosting Tur's copyrighted content on its site without Tur's permission.

Section II of this article details the background of two main areas of relevance: (1) the case history of *Tur v. YouTube*, including a background of plaintiff Robert Tur, defendant YouTube, Inc., and YouTube's anti-piracy techniques; and (2) the relevant controlling copyright law to this case, namely the law of contributory copyright infringement, the Digital Millennium Copyright Act (hereinafter DMCA), and applicable copyright case precedent.

Section III first discusses whether YouTube will enjoy the safe harbors provided by the DMCA. Specifically, this part analyzes the requisite qualifications necessary for safe harbor under the DMCA and whether or not YouTube will likely prevail on the subject in the current litigation. The second subject analyzed is whether or not YouTube will be found liable for infringement in light of the case precedent, taking into consideration the common law of contributory copyright infringement. This analysis will specifically investigate what can be learned from each of the three major precedential cases on point and how such case law can predict the likely outcome of *Tur v. YouTube*.

Section IV examines the impact that a liability judgment would have on YouTube and similarly situated companies upon the consideration of a first amendment freedom of expression policy. Additionally, this section analyzes other possible remedial measures for copyright holders besides bringing potentially crushing lawsuits on YouTube.

Ultimately, section V predicts that YouTube will not be found liable for contributory copyright infringement in the current suit due to (1) its protection from the DMCA as an Internet Service Provider, (2) the relevant facts of this case compared to keystone cases and the common law of contributory copyright infringement, and (3) the significant negative policy ramifications that a liability judgment would have on free expression.

II. BACKGROUND

A. The Case History of Tur v. YouTube, Inc.

On July 14, 2006, Rober Tur filed a contributory copyright infringement suit in the Central District Court of California against YouTube Inc., the owner and operator of a popular video sharing website.⁶ Tur alleged that video footage he shot in the early 1990's was downloaded over 5,500 times on youtube.com without his permission, and he claims as a result, YouTube is profiting from his work while hurting his chance to license the video.⁷ Tur is asking for injunctive relief in the form of a removal and ban of all of his videos from youtube.com, as well as \$150,000 in statutory damages for each violation of his rights.⁸

Tur is focusing on the recent decision from the United States Supreme Court *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, LTD.*⁹ *Grokster* held that one who distributes a device with the object of promoting its use to infringe copyright is liable for the resulting acts of infringement by third parties.¹⁰ In the answer to Tur's complaint, filed on October 10, 2006, YouTube claimed as its main defense that it is protected by the DMCA of 1998.¹¹ Specifically, the DMCA provides safe harbor for internet service providers whose users upload infringing content.¹²

6. *Id.* at 10.

7. *Id.* at 4.

8. *Id.* at 10.

9. *Id.* at 4.

10. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, LTD.*, 545 U.S. 913, 940 (2005).

11. Answer at 7, *Tur v. Youtube, Inc.*, 06-cv-04436 (C.D. Cal. Oct. 11, 2006). YouTube also raises seven additional defenses: (1) failure to give notice and comply with the requirements of the DMCA 17 U.S.C. § 512(c); (2) Plaintiff's claims are barred by the fair use doctrine; (3) Plaintiff's claims are barred by the doctrine of laches; (4) Plaintiff's state law claim is barred by the doctrine of preemption; (5) Plaintiff has failed to mitigate damages, if any; (6) Plaintiff's prayer for damages may be limited by his failure to timely register his copyright; and (7) Plaintiff's prayer for statutory damages is limited on the ground that Plaintiff failed to allege facts sufficient to show alleged infringement by YouTube was willful. *Id.* at 8.

12. 17 U.S.C. § 512(c) (2006).

1. *Rober Tur Background*

Robert Tur is a helicopter pilot and reporter who founded the Los Angeles News Service (hereinafter LANS), a duly accredited news gathering and reporting organization.¹³ Tur is credited with being the first reporter to televise a police chase live in 1992.¹⁴ Notably, LANS was the first to catch up with Al Cowlings and OJ Simpson during the famous slow-speed chase of 1994.¹⁵ According to Nielsen Ratings, Tur's coverage of the chase attracted over 95 million viewers, and was the highest rated television event of the year for basic cable.¹⁶ Another famous event that Tur covered from the air was the attack of Reginald Denny during the 1992 Los Angeles Riots.¹⁷ After watching the beating live on television, four residents rescued Denny, and he survived as a result.¹⁸

All of the content shot by Tur is protected by copyright owned by LANS.¹⁹ In the past, when major media networks televised any copyrighted clips owned by LANS, they routinely did so under proper license and with consent of Robert Tur.²⁰

13. Compl., *supra* note 5, at 2.

14. *Id.* at 3.

15. *Id.*

16. *95 Million Watched The Chase*, N.Y. TIMES, June 22, 1994, at A12, available at <http://query.nytimes.com/gst/fullpage.html?res=9A07EEDD103DF931A15755C0A962958260>. The ratings are calculated based on a cross section of about 10,000 homes across the United States who have agreed to be "Nielsen Families." <http://www.nielsenmedia.com/> (follow "FAQs" hyperlink; then follow "Our Research" hyperlink) (last visited Sept. 10, 2007). In order to track the actual viewing habits of the family, a "People Meter" is installed on their television to record the demographic of the viewer and what programming they watch. *Id.* The People Meter, which is a small electronic device that attaches to the back of a television, supplements the more traditional method of recording ratings, the paper diary. The paper diary relies on the viewer to fill out a seven-day log of what they watched on television. *Id.*

17. Compl., *supra* note 5, at 4.

18. Tunku Varadarajan, *Flying in the Face of Taste*, LONDON TIMES, May 8, 1998, available at <http://www.sree.net/stories/LTchopper.html> (last visited Sept. 10, 2007).

19. Compl., *supra* note 5, at 3.

20. *Id.* at 2.

2. *YouTube, Inc. Background*

Youtube.com is a video sharing website created by three former employees of the online payment service webcompany Paypal.com.²¹ The first video posted to YouTube was uploaded on April 23, 2005, and according to Alexa rankings, the site is now the fourth most popular website on the Internet.²² According to a July 2006 press release, YouTube users view 100 million video clips per day, and 65,000 new clips are uploaded daily.²³ The 67 employee company was recently purchased by Internet search giant Google for \$1.65 billion in Google stock on October 9, 2006.²⁴

Once a user creates a free account on youtube.com, that user is free to upload any number of videos with certain restrictions.²⁵ The length of each video is limited to ten minutes and 100 megabytes, and any type of inappropriate content as outlined in the YouTube.com Terms of Use is not allowed.²⁶ This includes pornography, libelous or defamatory videos, as well as racially or ethnically offensive content.²⁷ In addition to having a profile on

21. Greising, *supra* note 1, at C1. Founded in 1998, PayPal, an eBay Company, enables any individual or business with an email address to securely, easily and quickly send and receive payments online. PayPal, About Us, <http://www.paypal.com/cgi-bin/webscr?cmd=p/gen/about-outside> (last visited Sept. 10, 2007). PayPal's service builds on the existing financial infrastructure of bank accounts and credit cards and utilizes the world's most advanced proprietary fraud prevention systems to create a safe, global, real-time payment solution. *Id.*

22. See Alexa, Global Top 500, http://www.alexa.com/site/ds/top_500 (last visited Sept. 10, 2007). Alexa Internet hosts a website which posts traffic information listing the most visited websites and most popular searches on the Internet. Alexa, Company Info, <http://www.alexa.com/site/company> (last visited Sept. 10, 2007).

23. YouTube, Press Release: NBC and YouTube Announce Strategic Partnership (June 27, 2006), http://www.youtube.com/press_room_entry?entry=c0g5-NsDdJQ.

24. YouTube, Press Release: Google to Acquire YouTube for \$1.65 Billion in Stock (Oct. 9, 2006), http://www.youtube.com/press_room_entry?entry=HvfQ0AKougw.

25. YouTube, Terms of Use, <http://youtube.com/t/terms> (last visited Sept. 10, 2007).

26. *Id.*

27. *Id.* YouTube outlines its policy for dealing with users not complying

youtube.com, embedding technology allows YouTube users to put videos onto their own websites or blogs (online journals) directly. Each uploaded clip is identified on YouTube's database by "tags," user-chosen keywords recognizable by a search.²⁸

YouTube's users upload a wide variety of video clips including portions of television shows or movies, video blogs made with webcams, music videos, and various home videos. Though a vast majority of the clips on the website have never been the subject of a claim of copyright infringement, many videos are copyrighted works uploaded by the user without the consent of the copyright owner.²⁹

3. *YouTube's Anti-Piracy Techniques*

YouTube currently has four main strategies to discourage its users from uploading infringing video clips.³⁰

First, YouTube seeks to educate users about copyright laws.³¹ The site maintains a "Copyright Tips" section, which instructs users on what they should and should not do when uploading

with its regulations in the Terms of Use page:

A. YouTube will terminate a User's access to its Website if, under appropriate circumstances, they are determined to be a repeat infringer.

B. YouTube reserves the right to decide whether Content or a User Submission is appropriate and complies with these Terms of Service for violations other than copyright infringement and violations of intellectual property law, such as, but not limited to, pornography, obscene or defamatory material, or excessive length. YouTube may remove such User Submissions and/or terminate a User's access for uploading such material in violation of these Terms of Service at any time, without prior notice and at its sole discretion.

Id.

28. Compl., *supra* note 5, at 7. These "tags" do not always accurately describe what the video contains, and due to the idiosyncratic nature of the users' naming habits, misnamed tags present another obstacle for copyright owners to cross when searching for their work. *Id.*

29. Answer, *supra* note 11, at 5.

30. *Id.* at 6.

31. *Id.*

videos.³² Additionally, when users upload, the site reminds them that they are prohibited from posting copyrighted material without consent of the owner.³³

Second, YouTube is now working with television networks, movie studios, and record companies to enter into licensing agreements in which the rights holders will receive a royalty based on the advertising revenue generated on the page displaying their video.³⁴ YouTube has entered into deals with NBC, Warner Music Group, CBS Corp., Vivendi's Universal Music Group, and Sony BMG Music Entertainment.³⁵

Third, YouTube has implemented technological mechanisms to help prevent copyright infringement, and is currently developing more effective software to detect copyrighted works in a posted video.³⁶ After YouTube receives a takedown notice from a rights holder, it creates a digital hash of the video before removing it in order to prohibit subsequent re-posting of that video.³⁷ However, now that YouTube is working in agreement with major production studios, the rights holders need a way to identify their content on the site and decide whether or not they would like it taken down.³⁸ The new technology that will make this search possible, will be designed to scan a digital audio file, such as an MP3 or video, and compare the electronic "fingerprints" to databases of copyright material.³⁹ The last technological mechanism YouTube developed is called the "Content Verification Program."⁴⁰ This program provides a way for rights holders to easily identify potentially infringing videos and report them for prompt removal by YouTube.⁴¹

Fourth and lastly, YouTube has a policy of limiting its videos to

32. *Id.*

33. *Id.*

34. Answer, *supra* note 11, at 5.

35. *Id.* at 6.

36. Alex Veiga, *Antipiracy System Could Hurt YouTube*, NEWSFACTOR NETWORK, Oct. 13, 2006, <http://www.p2pconsortium.com/lofiversion/index.php/t10989.html>.

37. Answer, *supra* note 11, at 6.

38. Veiga, *supra* note 36.

39. *Id.*

40. Answer, *supra* note 11, at 6.

41. *Id.*

ten-minutes in length in order to prevent the posting of entire episodes of television shows or full-length movies.⁴²

B. Controlling Copyright Law

The controlling law on point for the issues brought up by Tur in his complaint comes predominantly from the common law of contributory copyright infringement, the DMCA, and case precedent. The controlling case law for contributory copyright disputes is primarily made up of three keystone decisions: *Sony v. Universal Pictures*, decided by the United States Supreme Court in 1984; *A&M Records v. Napster*, decided by the Ninth Circuit Court of Appeals in 2003; and *MGM v. Grokster*, decided by the United States Supreme Court in 2005.

1. Contributory Copyright Infringement

The Copyright Act does not expressly render anyone liable for infringement committed by another; however, the Patent Act expressly brands anyone who “actively induces infringement of a patent” as an infringer and further imposes liability on “contributory” infringers.⁴³ Due to the close historical kinship

42. *Id.* at 7.

43. *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 441 (1984). Regarding contributory infringement, the Patent Act says:

(a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.

(b) Whoever actively inducense infringement of a patent shall be liable as an infringer.

(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be

between patent law and copyright law, the Court in *Sony* extended the contributory infringement language from the Patent Act to the Copyright Act, noting the absence of language in the Copyright Act precluding such vicarious liability.⁴⁴ Liability may be imposed on a defendant who “with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another.”⁴⁵ Further, the Court recognized that contributory copyright infringement does not apply if the product is used for legitimate unobjectable purposes and is merely capable of

denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement.

35 U.S.C. § 271 (2006).

44. *Sony Corp.*, 464 U.S. at 439. “[O]ne may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.” *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.* 443 F.2d 1159, 1162 (2d Cir. 1971). The principal difference between contributory and vicarious infringement is the requisite knowledge component. *Id.* Vicarious infringement requires only a financial benefit due to the infringing activity and an ability to supervise the infringing activity. *Id.* Contributory infringement requires, in addition, actual knowledge of direct infringement. *Id.* A detailed analysis of vicarious infringement is not specifically discussed in this note.

45. *Gershwin*, 443 F.2d at 1162. Contributory copyright infringement is summarized generally by the following elements:

- (1) Plaintiff must establish copyright infringement by the primary infringer; (2) plaintiff must also establish the circumstances and/or relationship that would give rise to the liability of a third party; (3) in the past, acts of contributory infringement have generally fallen into one of two categories: (a) Personal conduct that contributes to and thus furthers direct infringement, or (b) Contribution of a ‘machine or good,’ which provides a means to infringe.

The UCLA Online Institute for Cyberspace Law and Policy, The Basic Principles of Copyright Law (Feb. 10, 2001), <http://www.gseis.ucla.edu/iclp/cbasics.htm> (citations omitted).

substantial non-infringing uses.⁴⁶

2. *Digital Millennium Copyright Act*

The DMCA defines a “service provider” as a provider of online services or network access, or the operator of facilities therefore.⁴⁷ A second definition expands to an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.⁴⁸

The DMCA provides safe harbor provisions for Internet Service Providers (hereinafter ISP), limiting liability for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by the ISP.⁴⁹ Specifically, the ISP is afforded immunity from infringement liability if three requirements are met.⁵⁰

First, the ISP must either (1) not have knowledge that material on the system is infringing, or (2) in absence of such actual knowledge, the ISP must not be aware of facts or circumstances from which infringing activity is apparent, or (3) upon obtaining such knowledge or awareness, the ISP must act expeditiously to remove or disable access to the material.⁵¹ Second, the ISP must not receive financial benefit directly attributable to the infringing activity, in a case in which the ISP has the right and ability to control such activity.⁵² Finally, upon notification of alleged infringement, the ISP must respond expeditiously to remove or disable access to the material that is claimed to be infringing or to be the subject of infringing activity.⁵³

46. *Sony Corp.*, 464 U.S. at 456.

47. 17 U.S.C. § 512(k)(1)(B) (2006).

48. *Id.* § 512(k)(1)(A).

49. *See id.* § 512(c)(1)(A)-(C).

50. *See id.*

51. *Id.* § 512(c)(1)(A)(i)-(iii).

52. *Id.* § 512(c)(1)(B).

53. 17 U.S.C. § 512(c)(1)(C).

3. *Copyright Case Precedent*

a. *Sony v. Universal Pictures*

In *Sony v. Universal Pictures*, the respondent copyright owners brought a suit seeking an injunction to prevent Sony, a home electronics manufacturer, from selling its “Betamax” video tape recording machine (hereinafter VTR).⁵⁴ Universal Pictures and other owners of content airing on free television claimed that sale of the VTR induced copyright infringement by encouraging consumers to record copyrighted television programs.⁵⁵ Sony responded that the VTR was intended to enable time-shifting, allowing a user to watch a program at a more desirable time by temporarily recording it.⁵⁶ Further, Sony alleged, time-shifting would actually increase the total viewing audience, and is something many producers would be willing to allow in a private setting.⁵⁷

Decided in 1984, the United States Supreme Court held that since VTRs were capable of substantial noninfringing uses and manufacturers had no knowledge of direct copyright infringement, the sale of such equipment to the general public did not constitute contributory infringement of copyrights.⁵⁸ The court reasoned that private noncommercial time-shifting in the home satisfies the standard of noninfringing uses because Universal Pictures has no right to prevent other copyright holders from authorizing such time-shifting from their programs, and because even unauthorized home time-shifting of Universal Pictures’ programs is legitimate fair use.⁵⁹

54. *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 420 (1984).

55. *Id.*

56. *Id.* at 421.

57. *Id.* at 443-4.

58. *Id.* at 456.

59. *Id.* Section 107 of the Copyright Act sets out four factors to be considered whether or not a particular use is fair:

(1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

b. A&M Records v. Napster

In *A&M Records v. Napster*, record companies and music publishers brought a copyright infringement action against Napster, a service that facilitated the transmission and retention of digital audio files by its users.⁶⁰ The Ninth Circuit Court of Appeals held that Napster was liable for contributory copyright infringement.⁶¹ The court reasoned that Napster had actual knowledge that its system was being used specifically for direct copyright infringement, and it materially contributed to infringement by failing to purge such material from its system.⁶² The court said Napster had both the ability to use its search function to identify infringing musical recordings and the right to bar participation of users who engaged in the transmission of infringing files.⁶³

c. MGM v. Grokster

Grokster, a distributor of peer-to-peer file sharing computer networking software, was sued by copyright holders for vicarious and contributory copyright infringement.⁶⁴ The United States

(3) amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (2006). The Court in *Sony* ruled that since time-shifting for a private home is a noncommercial nonprofit activity, use of the Betamax falls within the first factor of the Fair Use test which requires that “the commercial or nonprofit character of an activity” be weighed in any fair use decision. *Sony Corp.*, 464 U.S. at 449; see also H.R. REP. NO. 94-1476, at 66 (1976), as reprinted in 1976 U.S.C.C.A.N. 5679. Further, the Court said that Universal Pictures failed to carry their burden showing the fourth factor, and a use that has no demonstrable effect upon the potential market for the copyrighted work need not be prohibited in order to protect the author’s incentive to create. *Sony Corp.*, 464 U.S. at 450-51.

60. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1010-11 (9th Cir. 2001).

61. *Id.* at 1020.

62. *Id.* at 1022.

63. *Id.* at 1027.

64. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, LTD.*, 545 U.S. 913,

Supreme Court was asked to decide under what circumstances a developer/distributor of a product capable of both lawful and unlawful uses becomes liable for acts of copyright infringement by third parties using the product.⁶⁵

The Court held that one who distributes a device with the object of promoting its use to infringe copyright, as shown by a clear expression or other affirmative steps taken to foster infringement, is liable for resulting acts of infringement by third parties.⁶⁶ The Court reasoned that Grokster's primary appeal to users was their software's ability to access and download copyrighted works, and that Grokster failed to make an effort to filter or prevent the sharing of copyrighted works on the P2P network.⁶⁷

The Court refused to consider Grokster's arguments that it is analogous to Sony from *Sony Corp. of Am. v. Universal Studios, Inc.* and avoided reconsidering the *Sony* decision by holding that Grokster was distinguishable.⁶⁸ The Court found that since their

920-21 (2005). The court provided a background on what a peer-to-peer (P2P) network is, and how it works:

[Peer-to-peer networks allow] users' computers [to] communicate directly with each other, not through central servers. The advantage of peer-to-peer networks over information networks of other types shows up in their substantial and growing popularity. Because they need no central computer server to mediate the exchange of information or files among users, the high-bandwidth communications capacity for a server may be dispensed with, and the need for costly server storage space is eliminated. Since copies of a file (particularly a popular one) are available on many users' computers, file requests and retrievals may be faster than on other types of networks, and since file exchanges do not travel through a server, communications can take place between any computers that remain connected to the network without risk that a glitch in the server will disable the network in its entirety.

Id. at 919-20.

65. *Id.* at 918-19.

66. *Id.* at 919.

67. *Id.* at 926.

68. *Id.* at 941. In *Sony*, the Court held that manufacturers of video tape recorders (VTR) were not liable for contributory infringement of copyrighted material recorded from broadcast television because the VTR was capable of substantial non-infringing uses, and the manufacturer had no knowledge of

words and deeds of distributing a product with alternative lawful and unlawful uses went beyond mere distribution, *Grokster* showed a purpose to cause and profit from third-party acts of copyright infringement.⁶⁹

III. ANALYSIS

YouTube is not liable for copyright infringement for three compelling reasons: (1) they are shielded from liability because of the Internet Service Provider (“ISP”) safe harbors of the DMCA; (2) they are capable of substantial non-infringing uses as outlined in the *Sony* decision, they did not have actual notice of direct infringement and did not refuse to remove the infringing files as the defendants had in the *Napster* decision, and they have not taken affirmative steps to foster infringement as the defendants had in the *Grokster* decision; and (3) looking forward to the potential impact of the case, from a policy standpoint, the ramifications of finding liability for infringement run contrary to basic principles ensuring the first amendment’s constitutional protection of free expression.

A. Shielded by Safe Harbors of the DMCA

YouTube will enjoy the benefits of the DMCA’s safe harbor provisions for ISPs. The most important factor that YouTube must satisfy in order to qualify for the DMCA’s safe harbor is to show that they are indeed an ISP as defined in the statute.⁷⁰ Once established as an ISP, YouTube will show that they comply with the three guidelines required of ISPs to enjoy the safe harbors of the DMCA.⁷¹

1. YouTube Qualifies as a Service Provider

According to the terminology as defined by Congress in the

direct copyright infringement. *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 456 (1984).

69. *Grokster*, 545 U.S. at 941.

70. See 17 U.S.C. § 512(k)(1)(B) (2006).

71. See *id.* § 512(c)(1)(A)-(C).

DMCA, a service provider is “a provider of online services or network access, or the operator of facilities therefor.”⁷² At first blush, the term “Internet Service Provider” conjures up the notion that only Internet providers, such as Comcast or AOL who actually enable online access, are given that title. However, the definition as written by Congress in the DMCA was meant to be much broader than that, and as the Central District of California said in *Hendricson v. eBay Inc.*, an operator of an Internet website can qualify as an Internet service provider.⁷³ Though youtube.com does not offer the purchase of consumer goods as ebay.com does, its role as a provider of many online services, notably storing material at the direction of its users, qualifies it as a service provider within the broad statutory definition.⁷⁴

2. *Three Guidelines Required of ISPs for Safe Harbor Under the DMCA*

Since YouTube is a service provider, in order to be protected by the safe harbor provision, they must follow the appropriate rules regarding knowledge of infringing material, financial benefit attributable to the infringing material, and expeditious removal of infringing material upon notification of claimed infringement as required in section 512(c)(1).⁷⁵

a. *Knowledge*

The knowledge component requires that the service provider be without actual knowledge that the material on the system or network is infringing; in absence of such knowledge, the service provider is not aware of facts or circumstances from which infringing activity is apparent; or upon obtaining such knowledge

72. *Id.* § 512(k)(1)(B).

73. *Hendricson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1088 (C.D. Cal. 2002). *Hendricson*, the copyright owner of a motion picture, brought an infringement action against eBay, an online auction service, which had listed allegedly infringing copies. *Id.* at 1084. The court held that the web company came within the safe harbor provision of the DMCA. *Id.* at 1096.

74. *See* 17 U.S.C. § 512(k)(1)(B).

75. *See id.* § 512(c)(1)(A)-(C).

or awareness, acts expeditiously to remove or disable access to the material.⁷⁶

YouTube meets the requirements of the knowledge component for several reasons. First, since the uploading system is automated, YouTube merely provides the platform for displaying videos and it does not have actual knowledge of infringing activity.⁷⁷ YouTube only alters the videos automatically to convert them from the original file format into flash videos making them visible with all browsers.⁷⁸ This alteration is not material to the content of the video, and is done automatically hundreds of times per hour.⁷⁹ Second, YouTube's users number into the millions, and therefore, the 67 employees cannot possibly be aware of individual circumstances arising to infringement within the 60,000 videos uploaded daily.⁸⁰ Finally, after the content owner has duly notified YouTube of the allegedly infringing video, their track record of expeditiously removing the infringing videos has been good.⁸¹

b. Financial Benefit Attributable to Copyrighted Material

The financial component of section 512(c)(1) requires a service provider not to receive a financial benefit directly attributable to infringing activity, in a case in which the service provider has the right and ability to control such activity.⁸² In order to analyze this prong, it is important to understand the true definition of what the "infringing activity" really is. In YouTube's case, the alleged infringing activity is the users' posting of copyrighted videos without permission from the rights holder. The financial benefit YouTube reaps is from advertising revenue directly attributable to the *playing* of videos, not the *posting* of the videos.

Tur may argue that but for the posting of infringing videos,

76. *See id.* § 512(c)(1)(A)(i)-(iii).

77. Answer, *supra* note 11, at 4.

78. *See* YouTube, Terms of Use, *supra* note 25.

79. *See* YouTube, Press Release, *supra* note 23.

80. *Id.*

81. *See* Anne Broache, *SNL Cult Hit Yanked From Video-Sharing Site*, CNET NEWS, Feb. 17, 2006, http://news.com.com/SNL+cult+hit+yanked+from+video-sharing+site/2100-1026_3-6041031.html.

82. 17 U.S.C. § 512(c)(1)(B) (2006).

advertising revenue generated attributable to playing those videos would not be possible. While the but-for analysis sounds persuasive as regards a causal relationship argument, the statute clearly says “directly,” when referring to the source of financial benefit related to infringing activity. YouTube could make a strong argument that such ad revenue is not *directly* attributable to the infringing activity. An example of a financial benefit directly attributable to an infringing activity in this situation would be if YouTube charged users to upload material, most of which was infringing. In that scenario, the financial benefit (receiving subscription funds from users) would be directly related to the infringing activity (users uploading impermissible copyrighted material). Once again, in order to succeed in this line of reasoning, one still would have a difficult time arguing that a substantial amount of the material subscribers post is infringing. As YouTube’s service is free however, such analysis is inapplicable.

If this distant “direct” infringement were found in the YouTube case, it would be difficult to conceive of a situation in which a commercial ISP does *not* “receive a financial benefit directly attributable to the infringing activity,” within the meaning construed. Such a reading of the statute would undoubtedly narrow the scope of the DMCA safe harbor provisions considerably. Finally, YouTube is taking proactive steps to license professional material and, as more noninfringing content is posted on YouTube, the causal relationship between the infringing work and financial benefit is weakened even more so. In sum, YouTube will qualify for this prong of the safe harbor requirements because they are not enjoying a financial benefit *directly* attributable to the infringing uses.

c. Expeditious Take-down Procedures

The final requirement is that the service provider, upon notification of claimed infringement, responds expeditiously to remove or disable access to the material that is claimed to be infringing or to be the subject of infringing activity.⁸³

YouTube has very strong arguments for this component of the

83. *Id.* § 512(c)(1)(C).

required actions for safe harbor from liability, as they have been very diligent about removing all relevant videos once prompted with a take-down notice by a content owner.⁸⁴ An example of this is when NBC complained about the prevalence of Saturday Night Live sketches and particular Olympics-related clips appearing on YouTube.⁸⁵ Soon after receipt of a take-down notice, YouTube removed each mentioned video clip from its site, and in its stead posted a notice informing the user of that video's removal due to copyright issues.⁸⁶

Based on the above analysis of YouTube's defense under the DMCA, they will likely be found not liable for monetary or injunctive relief for infringement of copyright by reason of storage at the direction of a user on their network. The most difficult obstacle to overcome will likely be showing that YouTube does not receive financial benefit directly attributable to infringing activity. While this seems to be quite adverse to YouTube's case, it presents an even bigger problem for the content owner who must provide the sufficient burden of proof. The nexus between a particular video and the exact amount of directly attributable advertising revenue that it raises is tenuous, and it will be very difficult for a plaintiff to show that advertisement revenue was attributable particularly to his video, as opposed to the large volume of valid non-infringing works. Considering the difficulty of establishing what is direct and what is not direct in terms of financial benefit, and recognizing the proactive steps being taken to discourage and prevent copyright infringement, a court is likely to find that YouTube is protected by the DMCA's safe harbor provision.

84. See Broache, *supra* note 81. NBC Universal spokesperson Julie Summersgill said that the process of issuing a take-down notice to YouTube has been "a relatively amicable process," with content removed within 24 to 36 hours. *Id.*

85. *Id.*

86. *Id.*

B. Not Liable in Light of Case Precedent

1. YouTube Analogized with Sony

As the Court found in *Sony v. Universal Studios*, a videotape recorder was capable of substantial non-infringing uses (time-shifting), and the manufacturers' sale of that equipment did not constitute contributory copyright infringement.⁸⁷ Additionally, the Court found Sony was not liable for contributory copyright infringement because they did not have actual knowledge of infringement.⁸⁸

YouTube is analogous to *Sony* because the site is capable of and is indeed used for substantial non-infringing uses. In *Sony*, a substantial number of copyright owners licensed their works for broadcast television.⁸⁹ Similarly, *YouTube* has millions of users who create original videos and upload them to the website, giving *YouTube* a license to show the video. In *Sony*, the substantial non-infringing use was predominantly time-shifting, or allowing a television viewer to record a program and replay it at a later more convenient time for his personal use.⁹⁰ *YouTube* has many non-infringing uses, examples of which are explained below.

First, *YouTube* actively seeks out and negotiates licensing agreements with major television studios, record labels, and motion picture companies in order to create a mutually advantageous relationship.⁹¹ NBC, Warner Music Group, CBS Corp., Vivendi's Universal Music Group, and Sony BMG Music Entertainment have all signed licensing agreements with *YouTube* in order to allow their content to be available to the site.⁹² The most common compensation in these agreements is content owners receiving a portion of *YouTube*'s advertising profits which are directly attributable to their copyrighted videos.⁹³ Not only does

87. *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 456 (1984).

88. *Id.* at 452.

89. *Id.* at 456.

90. *Id.* at 443.

91. Answer, *supra* note 11, at 5.

92. See Veiga, *supra* note 36.

93. *Id.*

this provide the studios and record companies with a financial incentive, but YouTube's video length limitation of ten-minutes will prevent full episodes and feature length movies from being uploaded. Additionally, in exchange for allowing YouTube users to view its copyrighted content, the content owner can reap the benefits of free promotion of its content on the site.

Second, since the inception of YouTube, users have come up with many creative applications for the service that substantively contribute to their separate communities in various ways. For example, students from Columbia University have started a news station affiliate based solely on web video posts.⁹⁴ Integrated with its website, this news station allows students to serve as a press outlet for their peers with more expansive reach, but at a fraction of the price that a broadcast television production would cost.⁹⁵

Additionally, YouTube has made a direct contribution to a new type of musical group: a "Web Band." The self-proclaimed "World's First Web Band," the ClipBandits, met one another on YouTube and do not even know each other's real names.⁹⁶ The ClipBandits create music by individually videotaping each instrumental or vocal track and then compiling each contribution by playing the videos on separate monitors.⁹⁷ The final addition to the song is recorded live with the background of the others' video taped contributions playing in synchronization on monitors behind him.⁹⁸

As a final example, one user, Lonelygirl15, was involved in an extensive fictional drama series created specifically for YouTube in which an amateur group of filmmakers were able to create and market the series for only \$130, the price of a webcam.⁹⁹ This series has generated a large following as well as the attention of

94. Columbia University Television News, <http://www.cutelevision.org> (last visited Oct. 25, 2006).

95. *Id.*

96. See YouTube, ClipBandits, <http://www.youtube.com/clipbandits> (last visited Sept. 10, 2007).

97. *Id.*

98. *Id.*

99. Virginia Heffernan & Tom Zeller, *Well, It Turns Out That Lonelygirl Really Wasn't*, N.Y. TIMES, Sept. 13, 2006, at C1, available at <http://www.nytimes.com/2006/09/13/technology/13lonely.html?ex=1315800000&en=7eae0d6786f68939&ei=5088>.

national media.¹⁰⁰ Because of their success on YouTube, the group is allegedly planning to pursue professional opportunities based on the series.¹⁰¹ The above examples show just a small cross-section of the creativity and ingenuity of the YouTube community, all of which do not infringe upon the copyrights of others.

The Court in *Sony* further reasoned that a substantial number of copyright owners who license their material to broadcast television would not object to having their works time-shifted by private viewers, and that time-shifting was not shown to cause nonminimal harm to the potential market for their copyrighted works.¹⁰² In the same respect, as is obvious by the above examples, copyright owners who license their content to YouTube encourage free viewing because of the potential notoriety, popularity, and opportunities to which such exposure can lead.

As for the content on youtube.com that infringes a copyright but is not the subject of a takedown notice from a rights holder, according to the court in *Sony*, YouTube cannot be liable for contributory copyright infringement merely because the structure of its system allows for infringing uses.¹⁰³

2. *YouTube Contrasted with Napster*

In *Napster*, the court held that if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement.¹⁰⁴ Conversely, absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material.¹⁰⁵ Napster was found to have had actual knowledge of specific infringing material was

100. *Id.*

101. YouTube, Lonelygirl15, <http://www.youtube.com/profile?user=lonelygirl15> (last visited Sept. 10, 2007).

102. *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 456 (1984).

103. *Id.* at 442.

104. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001).

105. *Id.*

available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material.¹⁰⁶

YouTube is distinguishable from *Napster* because *You Tube* does not have sufficient knowledge of infringing uses on its site. When the Recording Industry Association of America (hereinafter “RIAA”) notified *Napster* of direct infringement, *Napster* penalized the users offering those infringing files; however, those songs were still widely available on the network at the time of the trial.¹⁰⁷ Conversely, when a copyright owner notifies *YouTube* of alleged infringement, not only does *YouTube* have an excellent reputation for expeditiously removing the content, but its “digital fingerprinting” technology prevents the repeated acts of infringement that faced *Napster*.

In addition to serving as a practical measure to prevent repeat infringement, *YouTube*’s file-recognition technology and proactive discouragement of copyright infringement is a sign of good faith – an important quality that *Napster* lacked. In contrast with *YouTube*, *Napster* executives were shown to have acted in bad faith, as evidenced by the finding that a co-founder mentioned “the need to remain ignorant of users’ real names and IP addresses ‘since they [we]re exchanging pirated music.’”¹⁰⁸ Further straying from a showing of good faith, as the district court found, *Napster* executives themselves downloaded copyrighted songs from the system and promoted the site with screenshots listing infringing files.¹⁰⁹

Further distinguishing the two, *YouTube*’s intentions and goals vary significantly from those of *Napster*. *Napster*’s database was built primarily to allow users to share and retain music, a vast majority of which was copyrighted and downloaded despite lacking permission of the copyright owner. *YouTube*, however, encourages more content creation than content consumption; as is evidenced by their tag-line: “Broadcast Yourself.” The infrastructure was created promoting a sense of creativity and

106. *Id.* at 1022.

107. *Id.*

108. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 918 (N.D. Cal. 2000).

109. *Id.* at 919.

community by encouraging users to comment and rate each other's videos, enabling users to subscribe to a particular "channel" or profile in order to follow another's video posts, and providing the capability to embed videos in remote websites. Youtube.com is a destination for temporary entertainment. Napster, however, was a portal through which users could access each other's hard drives in order to build a library of entertainment for later free use.

3. *YouTube Contrasted with Grokster*

According to the holding from *Grokster*, one can be found liable for contributory copyright infringement if the device was distributed with the object of promoting its use to infringe copyrights.¹¹⁰ The manner in which the court gauged this was based on whether the accused showed a clear expression or other affirmative steps to foster infringement, and whether they had knowledge that their product would be used for substantially infringing purposes.¹¹¹

YouTube is distinguishable from *Grokster* in that it does not harbor a clear expression or take any affirmative steps to foster copyright infringement. In *Grokster*, the defendant distributed software that had the primary appeal of enabling a user to share and retain copyrighted works.¹¹² In contrast, YouTube shares video files via "streaming video," which is a technology that allows a video to be viewed simultaneously as it is being downloaded, rather than viewed after a complete download, thereby making it quickly accessible in different browsers and not easily retained for future use away from the network.¹¹³ While it is possible to retain the file with additional programming and computer savvy, YouTube's primary intention is for the user to view the video only while visiting the youtube.com or the website in which the video is embedded.¹¹⁴

Additionally, the primary appeal of YouTube is not that it

110. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, LTD.*, 545 U.S. 913, 919 (2005).

111. *Id.*

112. *See id.* at 926.

113. Answer, *supra* note 11, at 5.

114. *Id.*

enables a user to share copyrighted works. While it has been shown that copyrighted works are being viewed on YouTube, valid user-created non-infringing videos make up a majority of those on the site, and the principal appeal of the whole YouTube social community is that it allows anyone to create their own broadcast of themselves.¹¹⁵ This is clearly distinguishable from *Grokster*, which was alleged to have nearly 90% of its contents infringing copyrights, and did not promote the creativity of user-produced digitized music to share.¹¹⁶ In addition, Grokster's software was external to the World Wide Web, and the interfaces were designed to be very simple and intended to solely perform the functions of searching for and transferring files. Contrariwise, youtube.com has become an online destination, which offers a plethora of communicative features and seeks to foster the sharing of creativity and innovation.

Along with finding that Grokster had an active expression of intent to foster use of the program to infringe copyrights, the Court found that Grokster was further culpable by not developing or attempting to develop filtering tools or other mechanisms to diminish the infringing activity using their software.¹¹⁷ Dissimilarly, YouTube has developed a digital hashing technology to recognize infringing videos once they become subjects of take-down notices in order to prevent re-posting of the same infringing videos by other users.¹¹⁸ Additionally, YouTube continues to develop more effective technological advances to achieve the same objective of identifying infringing videos despite the arbitrary tagged keywords entered by the user, and YouTube has a policy under which it will penalize and even ban users for repeat infringement offenses.¹¹⁹ If Grokster had implemented a similar policy protocol, one can only imagine the deleterious effect user penalties and bans would have on its traffic and subsequently on its advertising revenue, due to the overwhelming majority of

115. *Id.*; see also YouTube, <http://www.youtube.com> (last visited Sept. 10, 2007).

116. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, LTD.*, 545 U.S. 913, 933 (2005).

117. *Id.* at 939.

118. Answer, *supra* note 11, at 6.

119. See YouTube, Terms of Use, *supra* note 25.

infringing works involved.

The above analysis of the intent to promote copyright infringement shows that YouTube has not only not taken affirmative steps to promote infringing uses of its website, rather it has taken affirmative steps to *discourage and prevent* infringing uses of its site. While the removal of all infringing content on Grokster and Napster proved to ring their death knell, YouTube has and will continue to thrive due to its non-infringing user-produced or licensed content with effective policing and prevention measures in place to inhibit copyright infringement. Additionally, the primary intent of youtube.com is to promote and share user-created video in an online social community, not to pirate copyrighted digital songs in a utilitarian P2P software program.

IV. IMPACT

A. Ramifications of a Liability Judgment Against Public Policy

In addition to the importance of considering case law and statutory law when analyzing this case, significant fundamental constitutional policy may prove to be even more prominent. The main policy issue that hangs in the balance of whether or not liability is found for contributory infringement is the first amendment's freedom of expression.

If Tur prevails in this suit and receives his prayed-for judgment of \$150,000 per infringing video, the floodgates of litigation will be open, and anyone with copyrighted content impermissibly uploaded on YouTube will likely bring a suit and expect a similar payout. This result will in effect shut down YouTube as it currently operates, just as many lawsuits brought Napster to relative obscurity.

This case, however, is significantly distinguishable from *Napster* in that respect, as YouTube has a substantial amount of valid non-infringing original or licensed content. Additionally, when looking to the intentions of both companies, Napster was found to harbor the specific intent of allowing and fostering mass file sharing, in which the vast majority of content was knowingly

copyrighted and impermissibly copied. On the contrary, YouTube markets its site as giving average Internet users the chance to create original works and share them in an online community.

Additionally, upon a more in-depth background look at Robert Tur, it is clear that he is no stranger to litigation, and seems to fit the character of an opportunist looking for a handout.¹²⁰ Tur's litigious tendencies are aimed at protecting his own work; however, in this case if Tur received his prayed-for damages, he would be holding YouTube users hostage by enabling others similarly situated to sue the company in kind, resulting in a permanently crippling wave of litigation.

Short of shutting down their service, it is difficult to imagine what more YouTube could do in addition to their current protective measures to appease Tur. If they take a proactive role in taking down any copyrighted material which they know is not being posted by the author, they run the risk of unduly censoring someone's work who *wants* it to be viewed. Similarly, they cannot proactively seek out a certain sect of material – such as Mr. Tur's works – simply because of a known litigation threat; the sheer volume of videos to search through is too large, and the subjective decisions made would be far too arbitrary.

The ramifications of shutting down YouTube would unduly suppress a disproportionate amount of free expression as protected by the first amendment of the Constitution. Even if a copyright owner were to have a meritorious claim of infringement, the result of allowing him such relief would inevitably cause the detrimental result of unduly suppressing a significant amount of expression. A just balance of the two countervailing rights points to freedom of expression winning the battle. It is for this situation that the DMCA was created: to protect ISPs who foster creativity and free speech from crushing liability due to the content their users upload.

B. Other forms of relief

The copyright owners are not totally without possible relief. As the recording industry did during P2P disputes, the content owners

120. Fred von Lohmann, *YouTube Sued*, ELEC. FRONTIER FOUND., July 17, 2006, <http://www.eff.org/deeplinks/archives/004826.php>.

in this situation could start going after the actual direct infringer of the copyright: the uploading user. By 2004, the Recording Industry Association of America (RIAA) sued over 15,000 individual computer users accusing them of illegally sharing music across the Internet.¹²¹ Most of these users were college students who likely assumed they were downloading files under the cloak of Internet anonymity; however, through subpoenas tracing their Internet Protocol numbers, the users' identities were revealed.¹²²

Though this process might seem tedious and unavailing, due to the assumption that most users are not solvent enough to make litigation worthwhile, the fear of lawsuits might make video sharers more hesitant to upload an impermissible clip. Once the RIAA started showing colleges, students, and other high-traffic pirating networks that they were serious about prosecuting invalid file-sharing, the deterrent was arguably effective. Though there are no concrete numbers, and P2P illegal file-sharing will likely never be completely snuffed out, fear of legal action has deterred some from continuing their pirating ways. However, not all would agree that the aggressive strategy of the RIAA was effective. An article published by the "Electronic Frontier Foundation" (EFF) suggests that all of the RIAA prosecution was not only a waste because it failed to deter, but it alienated fans by giving the record industry the image of an overly antagonistic greedy group.¹²³

The situation content owners face with YouTube is distinguishable from their corresponding P2P copyright owners' dilemma in one major way. While users of Napster and other P2P networks were downloading files with the sole intent of retaining them, YouTube users do not retain the videos for use outside the network. The appeal of downloading files from Napster was to amass a collection of free music. The appeal of YouTube, however, is to view files posted on youtube.com or embedded in other websites. Although it is possible to pull the streaming video off of youtube.com and access it independent of the website, this method is likely rarely used because of its inconvenience.

The sacrifice that a typical P2P user has to make by ceasing his

121. ELEC. FRONTIER FOUND., *RIAA V. THE PEOPLE: TWO YEARS LATER 2* (2005), http://www.eff.org/IP/P2P/RIAAatTWO_FINAL.pdf.

122. *Id.* at 3.

123. *Id.* at 12.

infringing conduct is relatively high considering his acclimation with getting free music whenever he wants. If he stops uploading music and his cyber-friends stop uploading music, suddenly there is a smaller pool of free music to choose from. As a result, most downloaders just ignored the warnings from the RIAA in order to continue their downloading habits. However, the sacrifice a YouTube user has to make by taking down his infringing videos is significantly lower because of the difference in his end purpose. The main objective of a YouTube user is not to supplement his video clip collection, but to temporarily enjoy creativity, professional licenser's entertainment, and sometimes impermissible copyrighted material. The main difference is that this viewing is on a much more temporary scale than P2P sharing was, since almost all YouTube users can only access the videos while on the web. Because users have not come to expect this level of retention, they are intrinsically more unattached to the content than were the mp3 file-sharers. Therefore, the effective deterrence that widespread lawsuits would have on individual YouTube users is likely much higher than the past suggests.

V. CONCLUSION

Robert Tur alleged that YouTube is liable for contributory copyright infringement by hosting a website that serves as a portal for user-posted video content because some of the videos uploaded are used without consent of the copyright owner.¹²⁴ If successful, these allegations have the potential to hinder a significant volume of creative free expression included in the substantial non-infringing uses that the site is engaged in. Although the suit was in early stages as of the date of publication of this note, it is likely that YouTube will prevail in the Central District of California in light of the DMCA, past case precedent, and countervailing policy considerations.

A major issue of contention as regards YouTube's potential protection from the DMCA is whether or not they qualify as an ISP. If the answer to that preliminary question is affirmative, YouTube will further be scrutinized according to the three

124. Compl., *supra* note 5, at 3.

requirements of an ISP to enjoy protection from the safe harbor provisions.¹²⁵ Only upon qualification of both of these requirements will YouTube be able to hide behind the DMCA on the issue of contributory copyright infringement. This author predicts that (1) YouTube will qualify as an ISP according to the DMCA, and (2) that YouTube satisfies the criteria of 17 U.S.C. § 512(c)(1) because it does not possess actual knowledge of nor is aware of infringing material or activity, it does not receive a financial benefit directly attributable to infringing activity, and it expeditiously removes all allegedly infringing material upon notification from the copyright owner.

YouTube will likely prevail at trial in view of the contributory copyright infringement case law laid out in *Sony*, *Napster*, and *Grokster*. Since the video-site is capable of substantial non-infringing uses as were the VTR manufacturers in *Sony*, the court should find You Tube is not liable for contributory infringement. Additionally, YouTube is distinguishable from both *Napster* and *Grokster* predominantly due to the differences of intent. *Napster* was found to have intentionally promoted and enabled copyright infringement by creating a P2P interface for sharing and retaining mp3 music files from a database of users, of which a vast majority were impermissibly uploaded without consent of the copyright holder. In the same respect, *Grokster* was found to have intentionally targeted old *Napster* users as potential new participants of a similar P2P network. In *Grokster*, the Supreme Court found *Grokster's* words and deeds went well beyond distribution of songs and as such showed a purpose to cause and profit from third-party acts of copyright infringement. Distinguished from both *Napster* and *Grokster*, You Tube does not intend for users to retain videos from its database, and due to its diligent licensing and proactive anti-piracy actions, the court is likely to find it less culpable for purposefully profiting from third-party acts of copyright infringement.

Finally, the service YouTube offers as it is now is more beneficial to society as a whole than if it were shut down as a result of crushing copyright infringement judgments. The licensors who reap ad revenue from their content are satisfied not

125. See 17 U.S.C. § 512 (c)(1)(A)-(C) (2006).

simply because of the monetary incentive, but because of the free advertisement for their programming. The users who create and post independent videos are satisfied because of the potential notoriety and opportunity available, as well as the recreation of having an online community of friends with which to communicate and share videos. The advertisers are satisfied because viewers are attracted to the site by the millions, and the investment is a worthwhile venture. Finally, the guests of the site are satisfied because without cost, they can enjoy a vast and diverse selection of creative videos spanning from a full-length professionally produced music video coming directly from the artist to a fifty-second clip of a 16-year-old boy pranking a restaurant employee in a fastfood drive-thru line.¹²⁶

Philip Kunz

126. After this Note was written, the United States District Court of the Central District of California rejected YouTube's motion for partial summary judgment under Section 512(C) of the DMCA. YouTube alleged that it qualified for safe harbor under section 512 of the DMCA; however, the District Court found the evidence presented was insufficient to grant a summary judgment motion on the issue. This and other issues have proceeded to a more thorough evidentiary proceeding. In deciding on the summary judgment motion, the Court said:

There is insufficient evidence regarding YouTube's knowledge and ability to exercise control over the infringing activity on its site. There is clearly a significant amount of maintenance and management that YouTube exerts over its website, but the nature and extent of that management is unclear. YouTube also asserts that while it is able to remove clips once they have been uploaded and flagged as infringing, its system does not have the technical capabilities needed to detect and prescreen allegedly infringing videotapes. However, there is insufficient evidence before the Court concerning the process undertaken by YouTube from the time a user submits a video clip to the point of display on the YouTube website. Thus, there is insufficient evidence from which the Court can determine YouTube's right and ability to control the infringing activity.

Tur v. Youtube Inc., 2007 WL 1893635, *3 (C.D.Cal. 2007)